VIRGINIA LAW REGISTER

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A New County.

We do not know whether the author of the acts, the Committee on Enrolled Bills, the printer, or his devil are responsible for it, but amongst them all a new county has been created in this grand old Commonwealth. What its legal status is to be only the courts can determine—who is to represent it in the Legislature we do not know. A circuit judge has been—by indirection—appointed for it, this new county having been attached to the Eighth Circuit. But along with its appearance an historic county has dropped from the printed acts—except in the index, where it still remains thundering, we hope—but not entirely given over to Libitina. And yet this lost county has been a Virginia county since 1744. Thomas Jefferson was born in what was once its confines; so was George Rogers Clark; and here was founded the University of Virginia; and here once was edited and printed The REGISTER. For the County of Al*be*marle has vanished and the County of Al*ber*marle now stands in its place all through the printed Acts of 1912.

Jesting apart, is not this a matter of some little interest as showing gross carelessness somewhere? If an error so palpable and so inexcusable should be repeated more than once in the volume bearing the stamp of the State's official, may there not be others of greater moment?

We suppose the courts would decide that all acts relating to the County of Al*ber*marle, on the principle of *idem sonans,* would be held to apply to Albemarle, but what confidence can we put in the rest of the printed pages?

Our readers will recall the story of the "Wicked Bible" which got away from the printers with the word "not" left out of the Seventh Commandment, and cost Stationer's Hall ten thousand pounds. We would not advocate a similar fine for the unfortunates who have misspelt the great county's name, but we

would suggest that if the guilty party or parties can be found they should be required to write the name of every county and city in the State at least one hundred times and then be made to spell each orally before a joint committee of the Senate and House, of which the members of the Committees on Enrolled Bills should be part and parcel, and required to listen, mark and correct.

Due Process.

A curious and interesting point was decided by the Supreme Court of the United States in the case of Jordan *v.* Massachusetts on May 27th, 1912. Jordan was convicted of murder in the first degree and sentenced to death and the judgment was confirmed by the Supreme Judicial Court of the Commonwealth of Massachusetts. The plaintiff in error claimed that he had been denied due process of law under the Fourteenth Amendment. He was tried by a jury, one member of which was charged to have been insane, and concerning whose sanity it was said there existed a reasonable doubt. It appeared that the jury was selected in the usual way without any knowledge on the part of the State that White, the juror in question, was not mentally fit. After the verdict it was charged that this juror was insane, both during the hearing and at the time the verdict was agreed upon. That question was submitted to the Superior Court in Massachusetts, which decided that from a preponderance of the evidence it was of the opinion that this juror was of sufficient mental capacity during the entire trial and until after the verdict was returned to independently consider the evidence, the arguments of counsel, the charge of the Court, and to arrive at a rational conclusion. They therefore denied a motion to set aside the verdict and the Supreme Court of Massachusetts affirmed the decision of the Superior Court. It was argued before the Supreme Court of the United States that it was essential that the sanity of the juror should have been established by more than a fair preponderance of the evidence in a case of this character and that therefore the constitutional guarantee of due process of law found in the Fourteenth Amendment had been violated. The Court held that the pro-

ceeding in question being in absolute conformity to the Massachusetts Law of Criminal Procedure, no fundamental principle of justice was violated by a determination of the mental capacity of the juror by the preponderance of evidence, and that no rule of the common law was inconsistent with the practice adopted in this case. The brief but admirable opinion of Justice Lurton in this case gives an excellent epitome of the Law of Due Process. Quoting Allen *v.* Georgia, 166 U. S. 138, the Court says:

> "Without attempting to define exactly in what due process of law consists, it is sufficient to say that, if the Supreme Court of a State has acted in consonance with the constitutional laws of a state and its own procedure, it could only be in very exceptional circumstances that this Court would feel justified in saying that there had been a failure of due legal process. We might ourselves have pursued a different course in this case, but that is not the test. The plaintiff in error must have been deprived of one of those fundamental rights, the observance of which is indispensable to the liberty of the citizen, to justify our interference."

In criminal cases due process of law is not denied by a State law which dispenses with a grand jury indictment and permits prosecution upon information, nor by a law which dispenses with the necessity of a jury of twelve, or unanimity in the verdict. Indeed the requirement of due process does not deprive a state of the power to dispense with jury trial altogether. Hurtado *v.* California, 110 U. S. 516; Maxwell *v.* Dow, 176 U. S. 581. When the essential elements of a court having jurisdiction, in which an opportunity for a hearing is afforded, are present, the power of a state over its methods of procedure is substantially unrestricted by the due process clause of the Constitution.

And approves L. & N. R. Co. *v.* Schmid, 177 U. S. 230 as follows:

> "It is no longer open to contention that the due process clause of the Fourteenth Amendment to the Constitution of the United States does not control mere forms of procedure in state courts or regulate practice therein. All its requirements are complied with, provided in the proceedings which are claimed not to have been due process of law the person condemned has had sufficient notice and

adequate opportunity has been afforded him to defend. Iowa Central Railway *v.* Iowa, 160 U. S. 389; Wilson *v.* North Carolina, 169 U. S. 586."

The Court then proceeds as follows: "Due process implies a tribunal both impartial and mentally competent to afford a hearing. But to say that due process is denied when a competent state court refuses to set aside the verdict of a jury because the sanity of one of its members was established by only a preponderance of evidence, would be to enforce an exaction unknown to the precedents of the past, and an interference with the discretion and power of the State not justified by the demands of justice, nor recognized by any definition of due process."

We are glad to see in this case the Court again quote with approval the strong language of Mr. Justice Moody in Twining *v.* New Jersey, 211 U. S. 78.

"The power of their people ought not to be fettered, their sense of responsibility lessened, and their capacity for sober and restrained self-government weakened by forced construction of the Federal Constitution. If the people of New Jersey are not content with the law as declared in repeated decisions of their courts, the remedy is in their own hands."

The question of the probability of a juror being insane is not an entirely new one before the courts. It arose in the case of Hogshead *v.* State, 6 Humphrey (Tenn.) 59. The Supreme Court of Tennessee held that the trial court erred in not granting a new trial when it appeared probable that a juror was insane.

In Pari Delicto.

The undue or unreasonable preference or advantage alluded to in the third section of the United States Act of 1887, 24 Statutes at Large, page 379, and the Elkins Act of February 19th, 1903, 32 Stat. at Large, page 847, has had an effect which was we suppose very little calculated upon when it was originally passed. Mr. Nathan T. Kirby, who was the owner of a lot of high grade horses, wished them shipped from Springfield, Ill., to New York City in time to be sold at a public sale in

Madison Square Garden in the latter city. He therefore rented a car from the Chicago & Alton R. R. Company, who agreed in consideration of $170.60 to carry it over its own rails from Springfield to Joliet, Ill., and there deliver it to the "Horse Special," a fast train over the M. C. Railroad through to New York. This special was run but three times a week and was due to leave Joliet the following morning. Kirby loaded his horses as directed by the railroad company on the afternoon of January 24th, but the company did not promptly carry and deliver the same to the fast stock train on the morning of January 25th, as it had guaranteed to do. The consequence is that Kirby's horses were carried by the slow train and arrived too late for the special sale. Kirby, as might be very well expected, sued, recovered a verdict and the case went to the S preme Court of the United States which decided, May 27th, that Kirby was contracting for an advantage which was not extended to all others, both in the undertaking to carry so as to give him particularly expedited service and a remedy for delay not due to negligence, and that therefore the Elkins Act which made it unlawful "for any person, persons or corporation to offer, grant or give, or to solicit, accept or receive any rebate, concession or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereto whereby any such property shall by any device whatever be transported at a less freight than is named in the tariffs published and filed for such carrier, as is required by said act to regulate commerce and the acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced" applied; and that the advantage being given to Kirby as a particular shipper and to guarantee him a particular connection and transportation by a particular train was to give him an advantage or preference not open to all and not provided for in the published tariffs. Kirby, therefore, took nothing, and although he was in absolute ignorance of the published rates and schedules which did not make any provision for the service he contracted for, that was held to be no defence, and he and the railroad having mutually violated the law, there could be no recovery. It does, however, seem to us that this is stretching

the law to an unwarranted extent. There is no allegation that these rates were any more than the peculiar service warranted, but on the contrary the rates furnished Kirby were the regular published rates, but the court holds that these rates and schedules do not provide for an expedited service nor for transportation by any particular train. Kirby was not required to pay any more than anybody else but the sole question was in the view of the court that he was given an undue advantage by this expedited service. It does seem to us that this is carrying the doctrine a little too far.

Due Process Again.

We are not at all surprised that a whole volume has been written upon the single phrase "due process of law," and we hardly suppose that the draftsmen of the Fourteenth Amendment, originally solely intended for the protection of the colored race, had any idea to what limits the words would be extended. In a previous editorial we referred to the case in which the due process of law had been applied to protect a railroad from an attorney's fee practically in the nature of a penalty. This case came from Texas. In a case from the State of Arkansas *v.* Wynne, decided at the present term, the same question came up upon a statute which required a railroad to pay the owner of stock killed, within thirty days after notice of the killing. Failure to pay entitled the owner to double the amount of damages awarded him by any jury, and a reasonable attorney's fee. The owner of two horses killed within the state by the plaintiff's railway demanded $500. This the company refusing, he brought suit for $400, recovering that amount. The court gave him double damages and an attorney's fee of $50. We are a little at a loss to understand how "due process of law" could be held to apply to such a statute, but the Supreme Court of the United States seems to have no hesitancy in coming to the conclusion that the statute was an arbitrary exercise of the powers of government and a violation of the fundamental rights embraced within the conception of due process of law.

The court differentiates its decision in the case under discus-

sion from the case of the Seaboard Airline Railway *v.* Seegers, 207 U. S. 73, which provided a penalty of $50 for each failure or refusal of a railroad company to pay a claim for loss or damage to an intrastate shipment within forty days after filing the claim. In this latter case the court held that this did not come within the inhibition of the Fourteenth Amendment. The court in this case seemed to hold that this legislation was not primarily to enforce the collection of debts but to compel the performance of a duty. The case under discussion came from the Supreme Court of the State of Arkansas, which sustained the lower court, but the Supreme Court of the United States quotes the same court in Pacific Mutual Life Insurance Company *v.* Carter, 92 Ark. 378, in which that court held that the statute of the State was unconstitutional which directed that if a loss under a policy of insurance was not paid within the time specified, "after demand made therefor," the company should be liable, in addition to the amount of the loss, to twelve per cent damages and a reasonable attorney's fee.

An examination of these two Arkansas cases makes it almost impossible to reconcile them, and we are not at all surprised that the Supreme Court took the view it did. But we must confess that the "due process" clause of the Federal Constitution is one which seems almost as elastic as the "interstate commerce" clause and the "police power."

Session of the Supreme Court of Appeals at Wytheville.

The court met in regular session in Wytheville on June 11th. The first opinion day was on Thursday, June 13th, 1912. Upon that day the court handed down forty-one opinions, affirming the lower courts in twenty-six cases and reversing them in fifteen. The REGISTER will in due course publish these opinions. That our court has enough hard work to do, these forty-one opinions are sufficient evidence.

The Recall by Indirection.

It is to be deeply regretted that the Congress of the United States has given its countenance to the recall of judges in its worst shape. By declining to make an appropriation for the salaries of the members of the Commerce Court the Congress has practically destroyed the court without having the courage to take direct action. If that tribunal is one which should no longer exist, it is within the constitutional power of the Congress to abolish it; for all the Federal Courts except the Supreme Court of the United States are mere creatures of Congress and can be abolished by that body at will. With the political part of this action this journal has nothing to do, but as to its legality we think the subject germane for discussion. The important and interesting question is as to the power of Congress to take the action it has done.

Article III, § 1, of the Constitution of the United States provides: "The judges both of the Supreme and Inferior Courts shall hold their offices during good behavior and shall at stated times receive for their services a compensation which shall not be diminished during their continuance in office."

The object of this section is apparent and its purpose was clear in the minds of the draughtsmen of that instrument. It was intended to protect the judiciary from just what is now attempted to be done—i. e., to threaten their independence by reducing their salaries. That this action is in direct violation of the Constitution no lawyer can for a moment question. But the more important inquiry is, what remedy is there? In case the bill omitting the salaries of the judges from its appropriation is passed and the President approves it, what can be done? The Congress alone has the power of the purse. It can temporarily paralyze every function of the government by a failure to make any appropriation. It can starve out an unpopular President, judge or any other official, if a sufficient number of men oblivious of their oaths of office can be found to take such action. No power we are aware of can compel action. Are we not faced with a condition here, such as the English government has had to face and which practically reduces our written Constitution to waste paper? The House of Commons is the En-

glish government. There is no check upon it. Our House of Representatives—holding the purse strings—is our government. If the present method is once adopted as a mode of political warfare the end of our constitutional government is at hand. Thinking men must deprecate this mode of procedure as subversive of law and a fatal advance towards the destruction of our Constitution. Can any one suggest a remedy?

Action for Deceit against Directors.

The Supreme Court of the United States on March 18th handed down an interesting opinion in the case of Thomas *v.* Taylor. The plaintiff claimed that the defendants deceived and induced him to purchase thirty shares of the stock of their bank at $160 per share by making and swearing to a false statement which indicated that the stock was worth that amount, when in reality it was worthless, and he had to pay, in addition to his loss, an assessment of $100 per share.

The action was for deceit under the common law and not under any provisions of the National Banking Act. The defendants pleaded that the only action which could lie was under the last named act. But the lower court took the view that there was nothing in the statutes of the United States that destroyed the common-law action for deceit practiced by the directors of a national bank; that the statement complained of was false was clearly proven and the plaintiff recovered the full amount he claimed. This recovery is now sustained by the Supreme Court of the United States.

The main defense, however, in the case was that the common-law action of deceit did not lie and that the "scienter"—or actual knowledge—was necessary to charge the directors. The defendants contended that the statement was not voluntary, having been made under command of the National Banking Act, and that therefore the element of deceit was lacking and "proof was necessary of something more than mere negligence and recklessness; nothing short of an intentional violation will suffice." Unfortunately the comptroller of the currency had warned the directors prior to the making of their report that $194,000 of items counted as assets were doubtful and should

have been collected or charged off. They, notwithstanding this, represented these items to be good. This the Supreme Court very properly held to be violation of law. The importance of this decision to directors of national banks is apparent. It is also interesting as indicating that the statute has not changed the old remedy under the common law.

A Curious Case.

A somewhat singular case was decided by the Supreme Court of the United States in the case of G. C. & Santa Fé Ry. Co. *v.* Dennis, April 29th, 1912. A statute of the State of Texas allowed an attorney's fee of $20 in certain damage cases. A cow was killed by the railway and the owner sued in the Justice's Court, obtained a judgment for $75 and the fee, which on appeal was sustained in the County Court.

An appeal was taken directly to the Supreme Court of the United States upon the ground that the attorney's fee was awarded under a statute repugnant to the due process and equal protection clauses of the Constitution of the United States. Whilst this case was pending in the Supreme Court of the United States, the Supreme Court of Texas held the statute invalid because the subject of the act under which the fee was allowed was not sufficiently expressed in its title. The question then before the Supreme Court of the United States was what should be done with the case before them. If they sustained the Texas statute they overruled the highest court's decision although upon a distinctly different ground. If they reversed it they sustained the Supreme Court. They accordingly reversed the lower court and remanded the case.

An Appreciation.

In glancing over the pages of an exchange, and one that had traveled a long way to reach us, we were reading with pleasure and appreciation an article on "Sanity and Auto Suggestion," when it struck us that the verbiage of a striking paragraph or two had a somewhat familiar sound. Seeing nothing in the way of quotation marks or attribution of credit in connection

therewith, we puzzled our brain for some time before realizing that we were reading a portion of a recent editorial in our own magazine, which had been inspired by the recent tragic occurrence at Hillsville in Carroll County and the murder of the lamented Judge Massey and other court officials. We value this evidence that our poor efforts seem to have gone further afield than we had dared to hope, and we assure the writer of this paper, which was delivered before the Medico-Legal Society of New York, that we are glad that he found some inspiration in our editorial, and that we accidentally discovered that he had done so. We also value and appreciate even more the reproduction of portions of this same editorial by our valued contemporary, the West Virginia Bar. We cannot, however, forbear saying that these two incidents forcibly remind us of the distinction between kidnapping and adoption of children.